

3. Unfair Contract Terms (ss 23-27 ACL)

Part 2-3 ACL (ss 23-27) prohibits unfair terms in standard form consumer and small business contracts (SFks). The regime was significantly reformed in 2022 (effective November 2023), expanding scope and introducing civil penalties for the first time. Courts can declare a UCT void under s 23(1) while the balance of the contract continues under s 23(2).

RED FLAGS -- CHECK THESE FIRST

- ! Is the contract a 'consumer contract' (s 23(3)) -- individual acquiring goods/services/land for PDHUC) or a 'small business contract' (s 23(4)) -- fewer than 100 employees or <\$10M turnover)?
- ! Is the contract a standard form contract (SFk) under s 27?
- ! Is the challenged term a 'core term' (upfront price or main subject matter) -- which is exempt -- or a non-core term?
- ! 2022 Reform: Civil penalties now apply for proposing, using, or relying on UCTs. Each unfair term is a separate contravention (s 23(2A)).
- ! Is the term 'transparent' under s 24(3)? Lack of transparency makes a finding of 'unfair' more likely.

Core Terms vs Standard Form Terms -- Key Distinction

| Category | Definition and ACL Treatment |
|--------------------------------|--|
| Core terms | The upfront price of the product AND the main subject matter of the contract (make/model). These are assumed to be understood and consented to by the parties -- not subject to UCT scrutiny under Pt 2-3. |
| Standard form (non-core) terms | Privacy policies, disclaimers, dispute resolution clauses, arbitration clauses, choice of law/forum, unilateral variation clauses, etc. These are the terms assessed for 'unfairness' under ss 23-25. |

Step 1: Does the UCT Regime Apply? (ss 23(3)-(4), s 27)

Three gateway requirements: (1) the contract is a consumer contract or small business contract; (2) the contract is a standard form contract; (3) the term is a non-core term.

Consumer contract (s 23(3)): A contract for supply of goods/services or sale of land to an individual whose acquisition is wholly or predominantly for PDHUC. Note: subjective test -- different from s 3 definition.

Small business contract (s 23(4)): At time of contracting, at least one party employs fewer than 100 regular employees OR has annual turnover under \$10 million. No monetary threshold for contract value (post-2022 reform -- the old \$300,000 limit is abolished).

SCRIPT -- Step 1: Gateway Conditions

1. Consumer contract or small business contract? (ss 23(3)-(4)): Check whether the relevant party qualifies.

- -> **IF an individual acquiring goods/services for personal, domestic or household use:** consumer contract (s 23(3)).
- -> **IF a business with <100 employees or <\$10M turnover:** small business contract (s 23(4)).
- -> **IF a larger business:** UCT regime does not apply -- refer to general contract law.
- -> **COUNTER-ARGUMENT:** The other party may argue the acquisition was not 'predominantly' for PDHUC (subjective test) or that the relevant business exceeds the employee/turnover thresholds.

WRITE: The contract [is / is not] a [consumer contract / small business contract] because [the acquirer is an individual whose acquisition of [goods/services] was [wholly / predominantly] for PDHUC, namely [describe] / the business employed [number] regular employees and had a turnover of \$[amount], which [satisfies / exceeds] the s 23(4) thresholds].

2. Standard form contract? (s 27): A party alleging a contract is an SFK triggers a rebuttable presumption that it is one (s 27(1)). The court considers 5 factors (s 27(2)(a)-(e)).

- -> **IF one party had superior bargaining power and the contract was prepared in advance on a take-it-or-leave-it basis:** likely SFK.
- -> **IF the terms were genuinely negotiated and the counterparty had a meaningful opportunity to influence non-core terms:** likely NOT an SFK.
- -> **COUNTER-ARGUMENT:** The stronger party will try to rebut the presumption by showing there was real opportunity to negotiate non-core terms (e.g., correspondence showing counter-proposals were considered).

WRITE: The contract [is / is not] a standard form contract under s 27 because [one party prepared it in advance and it was presented on a take-it-or-leave-it basis, with [no / limited] opportunity for the other party to negotiate the non-core terms / the terms were negotiated between parties of [roughly equal / unequal] bargaining power and the counterparty had an effective opportunity to negotiate].

3. Core term or non-core term? The price payable and the main subject matter are excluded from UCT scrutiny (ss 24(1), 26). All other terms are assessable.

- -> **IF the term is the upfront price or the essential description of what is being supplied:** core term - cannot be challenged as UCT.
- -> **IF the term governs dispute resolution, unilateral variation, termination rights, liability limitation, or similar ancillary matters:** non-core -- can be assessed for unfairness.

- -> **COUNTER-ARGUMENT:** A party may argue a disguised ancillary term is really 'the price' or 'the subject matter'. Courts look to substance over form.

WRITE: The [term / clause] [is / is not] a core term because it [defines the upfront price of \$[amount]] and the main subject matter (supply of [describe]) / governs [dispute resolution / unilateral variation / termination / liability] and is therefore a non-core term subject to UCT assessment].

Step 2: Is the Term 'Unfair'? (s 24 ACL)

s 24(1): A term is unfair if ALL THREE criteria are met: (a) it would cause a significant imbalance in the parties' rights or obligations; (b) it is not reasonably necessary to protect the legitimate interests of the stronger party; and (c) it would cause detriment to a party.

s 24(2): In deciding, the court must take into account: (a) the extent to which the term is transparent; (b) the contract as a whole.

s 24(3): Transparency -- a term is transparent if it is: (a) in plain language; (b) legible; (c) presented clearly; and (d) readily available.

s 25 provides 14 non-exhaustive examples of potentially unfair terms (e.g., unilateral variation, unilateral termination, unilateral renewal, unilateral penalty imposition). A s 25 term is not automatically unfair -- the claimant must still show detriment and the other party can rebut by showing the term was reasonably necessary to protect its legitimate interests.

SCRIPT -- Step 2: Unfairness Test (s 24)

1. Significant imbalance (s 24(1)(a)): Does the term create a one-sided outcome -- imposing obligations or conferring rights in a way that is not reciprocal?

- -> **IF the term allows only one party to unilaterally vary, terminate, or penalise:** likely significant imbalance.
- -> **IF both parties have equivalent rights and obligations:** no significant imbalance.
- -> **COUNTER-ARGUMENT:** Defendant may argue the imbalance is justified by commercial reality and is common in the industry -- but this goes to criterion (b), not (a).

WRITE: The term [does / does not] cause a significant imbalance because it [allows only [Party A] to [unilaterally vary the price / terminate without cause / impose a penalty], without a corresponding right for [Party B] / imposes equivalent obligations on both parties].

2. Not reasonably necessary to protect legitimate interests (s 24(1)(b)): Onus on the party relying on the term to show it is reasonably necessary to protect its legitimate interests.

- -> **IF the term is standard in the industry and protects the supplier against genuine commercial risks:** may be reasonably necessary.
- -> **IF the term goes further than needed to protect the supplier and imposes unnecessary burdens on the other party:** not reasonably necessary.
- -> **COUNTER-ARGUMENT:** Stronger party will argue the term is a reasonable precaution against [commercial risk, e.g., non-payment, misuse, market fluctuations]. Weaker party will argue a narrower, less burdensome term would have sufficed.

WRITE: The term *[is / is not]* reasonably necessary to protect *[stronger party]*'s legitimate interests because *[describe -- e.g., the unilateral price variation clause goes beyond protecting against cost increases and allows variation for any reason, which is not necessary to protect the supplier's commercial position / the clause protects against [specific risk]* which is a genuine commercial concern and the term is proportionate to that risk].

3. Detriment (s 24(1)(c)): Would the term cause detriment (financial, non-financial, or practical) to a party if relied upon?

- -> **IF the term has never been enforced and is unlikely to be:** detriment may be harder to establish (though mere presence may be sufficient if it creates an imbalance in negotiating power).
- -> **IF the term has been enforced and caused actual loss:** detriment is clearly established.
- -> **COUNTER-ARGUMENT:** Defendant may argue the term causes no practical detriment because it has never been relied on or is unlikely ever to be relied on.

WRITE: The term *[would / would not]* cause detriment to *[Party]* because *[if relied upon, it would [describe consequence -- e.g., require the counterparty to pay a penalty equivalent to 12 months' fees upon any termination, creating significant financial exposure]* / the term has not been and is unlikely to be relied upon, and any theoretical detriment is minimal].

4. Transparency (ss 24(2)-(3)): The court must have regard to whether the term is in plain language, legible, clearly presented, and readily available. Lack of transparency makes a finding of unfairness more likely.

- -> **IF the term is buried in fine print or technical jargon:** lack of transparency supports a finding of unfairness.
- -> **IF the term is prominently disclosed and clearly explained:** transparency is present and the unfairness finding is less likely.

WRITE: The term *[is / is not]* transparent under s 24(3) because it *[is / is not]* expressed in plain language, *[is / is not]* legible, *[is / is not]* presented clearly, and *[was / was not]* readily available to the counterparty. **[Lack of transparency is a factor that makes the finding of unfairness more likely.]**

5. Consequence if unfair (s 23(1)-(2)): The unfair term is void, but the contract continues to bind the parties if it can operate without that term.

- -> Post-2022 reform: proposing, using, or relying on a UCT in an SFK is a separate civil penalty contravention (s 23(2A)) -- up to \$50 million per contravention for corporations.

- -> Each unfair term in a single contract is a separate contravention -- cumulative exposure.

WRITE: The term *[is / is not]* unfair under s 24(1) and is therefore *[void under s 23(1), with the remainder of the contract continuing / enforceable]*. *[Post-November 2023: proposing or relying on this term also constitutes a separate civil penalty contravention under s 23(2A), with maximum penalties of \$50 million per contravention for corporations.]*

Key Cases -- Unfair Contract Terms

| Case | Principle | Watch Out / Application |
|---|--|--|
| 2022 Reform (effective November 2023) | Expanded scope to businesses with <100 employees or <\$10M turnover; removed \$300,000 contract value threshold; introduced civil penalties for using or relying on UCTs; each unfair term is a separate contravention (s 23(2A)). | Always check whether facts pre- or post-November 2023 -- penalty exposure only applies post-reform. |
| s 27 SFK presumption | Once a party alleges the contract is an SFK, it is rebuttably presumed to be one (s 27(1)). The stronger party bears the onus of rebutting. | Check the 5 s 27(2) factors: bargaining power, preparation by one party, take-it-or-leave-it nature, opportunity to negotiate, whether non-core terms reflect specific characteristics of the other party. |
| 'Franchise reverse commission' scenario | A reverse commission term requiring the franchisee to pay a 10% commission on first 10,000 units may be an unfair term if it creates a significant imbalance not reasonably necessary to protect the franchisor's interests. | BD's non-obvious first argument on appeal: the term is a 'core term' (part of the pricing/subject matter) -- and therefore exempt from UCT scrutiny under s 24. |